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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/702,513	10/31/2000	Michael J. Leveille	19921/45	9261

7590 10/21/2003

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EXAMINER

ROSENBERGER, RICHARD A

ART UNIT	PAPER NUMBER
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2877

DATE MAILED: 10/21/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/702,513

Applicant(s)

LEVEILLE ET AL.

Examiner

Richard A Rosenberg

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-- **Th MAILING DATE of this communication appears on the cover sheet with the correspondence address --**
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on 04 August 2003.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-14 and 22 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☐ Claim(s) 1-14 and 22 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ 6) ☐ Other: _____

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1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 1-14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wynn (US 5,905,271).

Wynn shows a cell body having two ends and a fluidic channel allowing the passage of fluids (column 2, lines 6-9). There is an element holder (either of the "aligned apertures" 26, 27); the element holder has a substantially planar sealing surface (the bottom walls 31 of the recessed areas, which are sealing surfaces and are substantially planar). There is a stepped element (either of 16, 17) with a stem (19) and a base (21), the stem having an end surface and the base a substantially planar sealing surface. The stepped element is, in use, contained within the element holder and is sealed within the cell body by a sealing gasket (O-ring 29) positioned between the sealing surfaces of the element holder and the element. There are screws (37) which hold the structure together, exerting pressure on the gasket (31) between the two sealing surfaces. The stem portions of the elements create a measurement path length (column 2, lines 23-25).

The independent claim 1 refers to the pathlength created by the claimed structure as “non-adjustable”. Wynn teaches the use of set screws (44) to “lock” the “adjusted bodies” (36) in place (see column 3, lines 3-5); once the “adjuster bodies” are so locked in place the pathlength is “fixed” and “non-adjustable”.

Wynn discloses the use of screws (37) to hold the structure together. The use of bolts would have been an obvious substitution as the two are recognized equivalents.

It would have been obvious to make the windows out of any appropriate transparent material. It is known in the art to include lenses, either separately of by forming curved surfaces in the window, in sample cells; doing so in the device of Wynn et al would have been obvious. Those in the art could make design changes to the window and arrangement of Wynn such as varying the shape of the window while maintaining the functional aspects of the window and cell structure.

3. Claims 1-14 and 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dätwyler et al (US 5,003,174) in view of Wynn (US 5,905,271) and Goldsmith (US 4,580,901).

Dätwyler et al shows a flow cell with a cell body and a stepped window (4,5) and a sealing gasket (32) which lies between a sealing surface on the window (7) and on the cell body (10). The sealing surface on the cell body of Dätwyler et al is not “substantially planar”, but rather conical.

It is known in the art that stepped shaped windows of the type shown by Dätwyler et al can be sealed in a measuring cell with a sealing gasket when the sealing surface on the cell body is in a configuration other than the conical shape shown by Dätwyler et al. Wynn, for instance, shows substantially planar bottom walls (31) to seal the window.

It is also more generally known in the art that sealing gaskets can be used against planar surfaces to seal windows in fluid-containing sample cells. Goldsmith, for example, shows gaskets (23, 24) to seal a window ("radiant energy transmissive top 11") and a bottom element (13) to form a fluid-type cell structure.

Those in the art would have recognized, particularly given the known differences in construction among the sealing surfaces known in the art as illustrated by the references, that the exact shape of the sealing surface on the cell body is not critical; what is critical is that the sealing gasket fit against the window and the sealing surface of the cell body, whatever its shape, to seal the window so the cell does not leak. Thus those in the art would have found it obvious at the time the invention was made to use a "substantially planar" sealing surface in the place of the conical sealing surface of Dätwyler et al because it is, and would have been recognized as being, the function of sealing, and not the exact shape of the sealing surface, which is of importance in such situations, and would have been recognized that a "substantially planar" sealing surface would have accomplished this sealing function, while being a simple-to-manufacture configuration.

The use of bolts to hold the cell together would have been an obvious as such uses of bolts is well-known in the art; Goldsmith uses bolts (21) for such a purpose (see column 2, line 68), and also see the use of the similar screws in Wynn.

It would have been obvious to make the windows out of any appropriate transparent material. It is known in the art to include lenses, either separately of by forming curved surfaces in the window, in sample cells; doing so in the device of Dätwyler et al would have been obvious. Those in the art could make design changes to the window and arrangement of Dätwyler et al such as varying the shape of the window while maintaining the functional aspects of the window and cell structure.

4. The amendment filed 4 August 2003 has changed in the claims “stepped element” to “non-adjustable stepped element”.

The stepped element itself in both the instant invention and in the references is simply a particularly shaped piece of glass or plastic, and is, in both the instant disclosure and the references, inherently “non-adjustable”; there is nothing there to adjust. Adding such an inherent feature to the claim does not and cannot distinguish the two pieces of glass or plastic.

As argued (but not claimed), it is the surrounding supporting structure that makes the window of Wynn “adjustable” and the window of the instant invention “non-adjustable” in the manner which appears to be being argued. However, the claims do not distinguish this structure; the elements actually claimed are shown

and suggested by the references; the instant claims, using “comprising”, allow for additional unclaimed structure. The argued “non-adjustable” is a functional result of structure, not structure itself, and there is no supporting structure in the claims for this resulting function, and thus the addition of this language does not, and cannot, distinguish. If applicant believes that there are unclaimed structural differences between what the references show and suggest and the instant invention, applicant is of course free to put that difference into the claims; however, adding a purely functional result, without adding the structure to support this result does not add this unclaimed structure to the claims.

5. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

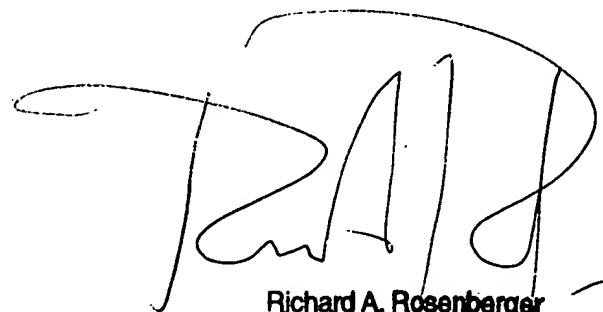
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6. Papers related to this application may be submitted to Group 2800 by facsimile transmission. The faxing of such papers must conform to the notice published in the Official Gazette, 1096 OG 30 (15 November 1989). The fax number is (703) 872-9306

Any inquiry concerning this communication or earlier communications from the examiner should be directed to R. A. Rosenberger whose telephone number is (703) 308-4804.

Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 308-0956.

R. A. Rosenberger
17 October 2003

A large, stylized handwritten signature in black ink, appearing to read 'R.A.R.', is positioned above the printed name and title.

Richard A. Rosenberger
Primary Examiner